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No. 88-658

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PANHANDLE EASTERN PIPE LINE COMPANY,
Petitioner,
v.
STATE OF ILLINOIS, *ex rel.* NEIL F. HARTIGAN,
Attorney General of the State of Illinois,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE KANSAS POWER AND LIGHT COMPANY AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rules 36 and 42 of the Rules of this Court, The Kansas Power and Light Company ("KPL") respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the granting of the petition for writ of certiorari. Petitioner has consented to the filing of this brief; respondent has not.

This *amicus* is familiar with the effect that the Seventh Circuit's decision will have upon persons other than petitioner and respondent. KPL is a plaintiff in antitrust litigation presently pending before the United States District Court for the District of Kansas, entitled *In re Wyoming Tight Sands Antitrust Cases*, Nos. 85-2349-S and Consolidated Cases. Currently pending before the United States Court of Appeals for the Tenth Circuit are appeals brought by the attorneys general for the States of Kansas and Missouri contesting the dismissal of their *parens patriae* claims in those consolidated cases brought on behalf of indirect residential purchasers of KPL's natural gas. Appeals Docketed, Nos. 88-8042, 88-8043. The attorneys general in those appeals maintain, *inter alia*, that the Seventh Circuit's decision in this case and its creation of an exception to the rule in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), is controlling and mandates the reinstatement of their *parens patriae* claims. Such a result will greatly complicate the discovery and trial of those consolidated cases and could cause the dismissal of certain claims brought by KPL allowing certain antitrust violations and millions of dollars in damages to go unremedied.

KPL has no direct interest in the outcome of the litigation between petitioner and respondent. However, KPL believes the issues raised by the Seventh Circuit's decision are of such overriding importance to the uniform interpretation of the federal antitrust laws and the successful prosecution of significant antitrust litigation in the District of Kansas, that review by this Court is required.

KPL therefore moves for leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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November 16, 1988

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BRIEF OF THE KANSAS POWER AND LIGHT COMPANY AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST OF AMICUS CURIAE

The Kansas Power and Light Company ("KPL") is a regulated public utility which distributes natural gas to industrial, commercial, and residential customers in the states of Kansas, Missouri, Oklahoma, and Nebraska. KPL is a plaintiff in litigation pending before the United States District Court for the District of Kansas, entitled *In re Wyoming Tight Sands Antitrust Cases*, Nos. 85-2349-S and Consolidated Cases (hereinafter "*Tight Sands*"). Therein KPL asserts claims under

the federal antitrust laws to recover illegal overcharges for natural gas that KPL purchased directly from the named defendants and either resold to its industrial, commercial and residential gas customers, or consumed in the generation of electricity which, in turn, was sold to such customers.

Despite this Court's holdings in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), each of the defendants in the *Tight Sands* litigation asserted a pass-on defense claiming that KPL "passed-on" any illegal overcharges to its customers. In addition, and subsequent to the filing of KPL's action, the attorneys general of the States of Kansas and Missouri asserted *parens patriae* claims on behalf of indirect purchasers who are residential customers of KPL and other direct gas purchasers. The States' *parens patriae* claims overlap the damage claims brought by KPL.

As a result of the ongoing *Tight Sands* litigation in the District of Kansas, KPL has a vital interest in reaffirmance of the rules set forth in *Illinois Brick* and *Hanover Shoe* barring the use of offensive and defensive pass-on theories, and the strict construction of any exception thereto. The resolution of this case will have a direct and significant impact on the prosecution of the antitrust claims asserted by KPL in the District of Kansas. Affirmance of the Seventh Circuit unique "regulatory equivalent" exception would greatly complicate the discovery process, and could result in all or many of the claims asserted by KPL being dismissed and serious antitrust violations going substantially unremedied.

The validity of the "pass-on" theory and the indirect purchaser claims brought by Kansas and Missouri as *parens patriae* is presently on appeal to the United States Court of Appeals for the Tenth Circuit. *In re Wyoming Tight Sands Antitrust Cases, appeals docketed,*

Nos. 88-8042, 88-8043 (10th Cir. 1988). Oral argument is scheduled for November 18, 1988.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION IN *PANHANDLE EASTERN PIPE LINE COMPANY v. STATE OF ILLINOIS* DIRECTLY CONFLICTS WITH THE REASONING OF THIS COURT IN *ILLINOIS BRICK* AND *HANOVER SHOE*.

In *Panhandle Eastern Pipe Line Company v. State of Illinois*, 852 F.2d 891 (7th Cir. 1988), the Seventh Circuit fashioned a unique "regulatory equivalent" exception to the *Illinois Brick* rule barring indirect purchaser antitrust claims. In so doing, the Seventh Circuit misinterpreted and misapplied the reasoning employed by this Court in *Illinois Brick* and *Hanover Shoe*.

Under the Seventh Circuit's reasoning, indirect residential gas purchasers may prosecute claims under the federal antitrust laws to recover allegedly illegal overcharges "passed on" by regulated public utility companies pursuant to Purchased Gas Adjustment (PGA) clauses contained in the utilities' tariffs. Such claims could be asserted in a variety of ways: by state attorneys general as *parens patriae*, as a class action on behalf of all affected residential consumers, or by separate suits of individual consumers. The Seventh Circuit also would permit industrial gas consumers which purchased gas from the price-fixer through a regulated public utility company to prosecute such claims, unless evidence proves that the regulated public utility absorbed any part of the alleged illegal overcharges by altering its rate structure. Finally, the Seventh Circuit would permit the regulated public utility itself to assert antitrust claims for illegal overcharges only if the utility can demonstrate that it had absorbed a portion of the overcharges in its rate structures. If no such evidence were available or developed, the public utility would be limited to recovering

lost sales profits proximately caused by the illegal overcharges. The Seventh Circuit made no reference to a utility's "commercial" customers (entities ranging from the corner drug store, to the concert hall, to the shopping center) leaving it unclear whether such customers or the utility could sue for overcharges.

Thus, under the Seventh Circuit's approach, both direct and indirect gas purchasers are permitted to assert and prosecute federal antitrust claims. But no one knows who ultimately can recover damages, or the type of damages recoverable, until after lengthy and expensive discovery takes place, demonstrating that the Seventh Circuit's "regulatory equivalent" exception to *Illinois Brick* is wrong for at least three reasons.

First, such an exception necessarily would require a factual analysis of the natural gas industry from wellhead to burner tip, including the structure, operation, and effectiveness of federal and state regulatory controls in the states in which the utility plaintiff does business in order to verify compliance with the policies underlying *Illinois Brick*. This Court, however, specifically prohibited that exercise in *Illinois Brick* because "the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid." 431 U.S. at 744-45.

Second, a "regulatory exception" would transform every industrial, commercial, and residential gas customer of the utility in each of the states in which it does business into a potential antitrust plaintiff. Central to this would be the determination of customers' ability to switch to alternative fuels. As noted in *Illinois Brick*, Rule 19(a) and (c), Fed. R. Civ. P., would require joinder or at least identification of all such parties and the possible designation of a class representative. 431 U.S. at 738-39. Largely because of this, the Court prohibited any use

of a pass-on theory which "would transform treble-damage actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." 431 U.S. at 740.

Third, a regulatory exception would require apportionment of damages among numerous industrial, commercial, and residential indirect purchasers located in various states (each with potentially different regulatory schemes) and spread throughout the utility's distribution chain. In KPL's case, for example, the court and jury would be required to allocate damages among numerous gas consumers located in Kansas, Missouri, Oklahoma, and Nebraska. This Court in *Illinois Brick* noted that "such an apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group." 431 U.S. at 745. Large scale apportionment of damages, combined with the original uncertainty of recovery, would reduce the incentive to sue, and thereby seriously impair the effectiveness of antitrust actions. Accordingly, this Court held that the important policy of antitrust enforcement "is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." 431 U.S. at 746.

The Seventh Circuit's decision plunges antitrust litigation involving regulated public utilities into a nightmare of complexity and confusion, and ultimately will "seriously impair" private plaintiff actions, such as KPL's claims in the *Tight Sands* litigation, as an "important weapon of enforcement." *Illinois Brick*, 431 U.S. at 745. That decision "would substantially erode the *Hanover Shoe* rule without justification." *Illinois Brick*, 431 U.S. at 744.

II. THE EFFECT OF THE SEVENTH CIRCUIT'S DECISION ON THE *TIGHT SANDS* LITIGATION DEMONSTRATES THE UNACCEPTABLE DEGREE OF COMPLEXITY THAT A "REGULATORY EXCEPTION" TO *ILLINOIS BRICK* COULD ADD TO ANTITRUST OVERCHARGE CASES.

Contrary to the Seventh Circuit's depiction of regulated utilities as "reluctant suitors," Pet. App. A-7, KPL filed suit under Sections 1 and 2 of the Sherman Act in September of 1984, *before* the States' *parens patriae* suits were filed, against five natural gas producers (Amoco Production Company, Cities Service Oil and Gas Corporation, CSG Exploration Company, Wamsutter Limited Partnership, and Moxa Limited Partnership, hereafter "producer defendants") and one interstate pipeline (Williams Natural Gas Company, hereafter "Pipeline"). In its complaint, KPL alleges that the producer defendants and Pipeline, acting in combination, unreasonably restrained competition and fixed the wellhead price for Wyoming natural gas sold by the producer defendants to Pipeline.

Pursuant to the parties' combination, Pipeline agreed to buy gas from the producer defendants at artificially high prices and under contracts with anticompetitive terms and conditions that perpetuated the unreasonable prices. Hiding these overcharges within its total purchased gas cost, Pipeline passed-on the artificially inflated prices to numerous downstream purchases, including KPL, and reaped benefits for the combination from those sales. KPL seeks to recover, before trebling, all illegal overcharges paid to the Pipeline for natural gas, as well as all sales profits lost by KPL due to the artificially increased gas prices.

Following the lead of KPL, the attorneys general of the States of Kansas and Missouri subsequently filed virtually identical suits on behalf of State agencies and in their capacity as *parens patriae*. These cases overlap the damage claims of KPL to the extent that the States

claim as damages the illegal overcharges included by KPL in its prices to its indirect residential customers. KPL's action and the States' actions ultimately were consolidated in the *Tight Sands* antitrust litigation now pending in the District of Kansas. The chart, included herein as an Appendix, identifies all of the parties in the *Tight Sands* litigation, their relationship to the challenged conspiratorial conduct, and the relationship of additional unrepresented direct and indirect gas purchasers.

In response to KPL's allegations, each defendant claimed as an affirmative defense that KPL had "passed on" all illegal overcharges to its customers. On motion by KPL, however, the Kansas District Court entered partial summary judgment against defendants on that defense and dismissed *sua sponte* the *parens patriae* claims of Kansas and Missouri. The District Court correctly reasoned that this Court's holding in *Illinois Brick* requires identical treatment of offensive and defensive "pass-on" claims. *In re Wyoming Tight Sands Antitrust Cases*, 1988-2 Trade Cases (CCH) ¶ 68,164 (D. Kan. 1988). The States of Missouri and Kansas (but not the defendants) appealed the District Court's interlocutory ruling to the Tenth Circuit. *In re Wyoming Tight Sands Antitrust Cases, appeal docketed*, Nos. 88-8042, 88-8043 (10th Cir. 1988). The Tenth Circuit is scheduled to hear oral argument of these appeals on November 18, 1988.

One dramatic effect on KPL's case of the Seventh Circuit's decision, if affirmed by this Court or if followed by the Tenth Circuit, will be the exclusion of most or all of the claims asserted by direct gas purchasers who resold gas to indirect gas purchasers. Direct purchasers that appear in the Appendix with broken lines beneath them would lose most or all of their claims. Only end users separately represented in this action—designated in the Appendix by solid lines from the direct purchaser—would remain. But those end users do not and cannot represent all damages incurred at that distribution level.

Indirect industrial and commercial gas purchasers identified in the Appendix have not asserted claims in the action now pending in the District of Kansas. Section 4c of the Clayton Act, which authorizes the *parens* action, expressly restricts state representation to claims of "real persons," thus rendering state representation of the industrial and commercial indirect purchasers under this provision impossible. 15 U.S.C. 15c. Because KPL may not have absorbed a portion of the illegal overcharge and the numerous industrial and commercial gas customers of KPL have not sued separately, every cent of illegal overcharge ultimately allocated to those gas consumers may be rendered unrecoverable if the Seventh Circuit's decision is affirmed. Those overcharges alone constitute more than one half of all damages claimed by KPL.

Ironically, such a result would be 180 degrees contrary to the result the Seventh Circuit struggled to reach. By constructing its *Illinois Brick* exception, the Seventh Circuit advised it was preventing $50 million in illegal overcharges from going "unremedied." Pet. App. A-14. If applied to *Tight Sands*, the Seventh Circuit's approach could result in millions of dollars of overcharges going unremedied.

Additionally, application of the Seventh Circuit's "regulatory equivalent" exception to the *Illinois Brick* rule will substantially increase the complexity of KPL's action, as well as all future antitrust actions involving regulated utilities, to unmanageable levels. Each plaintiff arguably could be required to adduce evidence of its fuel switching capability, each preceding purchase and sale, the degree of elasticity of demand at each level of distribution, and the extent to which an overcharge is absorbed at each level. Indirect buyers will be required to track gas payments upstream from end users, through one or more intermediate purchasers, to direct purchaser and to the conspirators. Establishing this causal chain of injury is complicated, increasing the likelihood of confusion and error at trial, and decreasing the likelihood of

vigorous antitrust enforcement by any potential plaintiff.

These concerns are precisely the same as those faced by this Court in *Hanover Shoe* and *Illinois Brick* which resulted in the rules announced therein.

III. THE PURCHASE GAS ADJUSTMENT CAUSE IN A UTILITY'S TARIFFS IS NOT THE FUNCTIONAL EQUIVALENT OF A FIXED QUANTITY, COST-PLUS CONTRACT UNDER *ILLINOIS BRICK*.

The Seventh Circuit asserts that the PGA clause in a utility's tariffs, combined with state regulation of the utility, constitutes the functional equivalent of the fixed-quantity, cost-plus contract exception under *Illinois Brick*. This assertion is unfounded.

The purchase gas adjustment clause is a provision in the tariffs of regulated utilities in Kansas and elsewhere (including Illinois in the case of Petitioner) which removes, from expenses considered in rate cases, the costs associated with energy purchases by the regulated utility. Beginning in the early 1970's, when energy costs began increasing rapidly, state utility commissions authorized adoption of PGA clauses as a common feature of state utility regulation. The PGA reduced otherwise unmanageable burdens of rate review hearings and rate adjustments required by fuel cost escalations. The PGA also reduced the administrative expense and efficiency losses generated by long delays in the rate review process.

The PGA mechanism, however, does not include a fixed-quantity guarantee for a utility's sales to its customers. To the contrary, the PGA addresses only attempted inclusion of gas costs in the utility's prices, regardless of their effect on subsequent sales; it does not guarantee that a utility, as a direct buyer of an illegally price-fixed product, will not lose sales if an overcharge is "passed

through." The fixed-quantity component of the *Illinois Brick* recognized exception thus is not met.

In the *Tight Sands* litigation, KPL alleges damages that do not overlap those suffered by indirect purchasers. KPL has suffered damages due to load lost when consumers of natural gas either cut back on the amount of gas they purchased from KPL, or switched fuel sources altogether. While the Seventh Circuit would allow KPL to recover damages related to its load loss, it would not permit KPL to sue for damages related to the overcharge. KPL also consumes gas that it does not resell to indirect plaintiffs. The overcharge attributable to this gas is an expense which KPL attempts to recover in its overall rates charged to customers. Depending upon elasticities of demand, KPL's sales correspondingly change.

A PGA clause is not a "magic mechanism" treating purchased gas costs less rigorously than any other utility expense that a regulated entity seeks to recover in its rates. It simply attempts to speed recovery of adjustments in those rates without the expense and delay of a full rate case. It includes and adjusts gas costs in rates; it does not forego review. If attempted inclusion of purchase gas expenses in a utility's PGA constitutes an *Illinois Brick* exception, then one could argue that a utility's recovery of other costs, to the extent they are reflected and can be identified in rates, constitutes an exception as well. *See* 1 A. Priest, *Principles of Public Utility Regulation* 47, 50 (1969). That same argument also could apply to any business' cost which is reflected in its prices, the very thing this Court considered and rejected in *Illinois Brick*.

The Seventh Circuit's decision is therefore flawed and should be reversed.

IV. THE SEVENTH CIRCUIT'S ALLOWANCE OF THESE INDIRECT CLAIMS IS TANTAMOUNT TO PERMITTING STATES, THROUGH THEIR REGULATION OF UTILITIES, TO DEFINE THOSE PARTIES INJURED UNDER SECTION 4 OF THE CLAYTON ACT CONTRARY TO *IN RE CEMENT AND CONCRETE ANTITRUST LITIGATION*, 817 F.2d 1435 (9th Cir. 1987), *prob. jur. noted sub nom., CALIFORNIA v. ARC AMERICA CORP.*, No. 87-1862 (Oct. 3, 1988).

By recognizing a "regulatory equivalent" exception to *Illinois Brick*, the Seventh Circuit endorses a procedure by which a state, either by way of legislation or state agency promulgation of rules or regulations, may determine who may ultimately bring claims for overcharge damages under the federal antitrust laws.

Not only would a state have such authority by creating a PGA or similar mechanism, but it would have the ability to affect a party's standing by how it structures its tariffs and classifies a utility's customers. Moreover, a utility which operates in more than one state could be conferred standing in one state but not in another, depending on each state's practices. Uniform enforcement of the federal antitrust laws by regulated utilities would be impossible.

Such authority on the part of state legislatures and state regulatory bodies is inconsistent with the federal antitrust laws as authoritatively interpreted by this Court in *Illinois Brick*. Permitting the states to "turn on" and "turn off" antitrust standing by the creation of PGA or similar regulatory mechanisms would interfere with the efficient and uniform enforcement of the antitrust laws by private plaintiffs.

This Court has noted probable jurisdiction in a case raising similar policy concerns. *California v. ARC American Corp.*, No. 87-1862, *prob. jur. noted*, —— U.S.

——, 57 U.S.L.W. 3197 (Oct. 3, 1988). This Court should grant the petition here in order to assure uniform interpretation of the federal antitrust laws.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

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APPENDIX

Wyoming Tight Sands Antitrust Cases